(1) 98-82

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1997

FILED
JUL 7 1998
OFFICE OF THE CLERK
SUPREME COURT, U.S.

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 18,

Petitioner

v.

MICHAEL VENCL,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

William Fadel, Esq.
Counsel of Record
Kathleen M. Sasala, Esq.
WULIGER, FADEL & BEYER
1340 Sumner Court
Cleveland, Ohio 44115
(216) 781-7777
Counsel for Petitioner

65 pp

QUESTIONS PRESENTED

Whether or not the law governing a union's duty of fair representation contains a bright line rule that absent bad faith or arbitrary or discriminatory conduct, a union breaches its duty of fair representation when it misses a grievance procedure deadline for requesting arbitration by only one (1) day through unintentional inadvertence and nevertheless gave notice of intent to arbitrate prior to the expiration of the cut-off date?

Whether the Sixth Circuit departed from established precedent by holding that a Union can be adjudged liable for breaching its duty of fair representation in a hybrid § 301 case, for breach of contract by an employer and breach of the duty of fair representation by the Union, absent a prior showing that the employer is liable?

LIST OF PARTIES

The Petitioner is the International Union of Operating Engineers, Local 18. The sole respondent is an individual named Michael Vencl.

TABLE OF CONTENTS

Page

Questions Presented i

List of Parties ii

Table of Authorities v

Opinions Below 2

Jurisdiction 2

Statutory Provision Involved 2

Statement of the Case 3

Reasons for Granting the Writ 9

I. CONTRARY TO ESTABLISHED PRECEDENT, THE SIXTH CIRCUIT PANEL'S DECISION IMPOSED A MANDATORY FILING DEADLINE AKIN TO A STATUTE OF LIMITATIONS UPON AN AGREED UPON GRIEVANCE PROCEDURE. 9

A. The Panel's Decision Holding Local 18 Liable For A Breach Of The Duty Of Fair Representation For Missing An Arbitration Deadline Is In Direct Conflict With Various Decisions Of This Court And The Sixth Circuit. 10

B. The Sixth Circuit Court Panel's Decision Is In Conflict With Decisions Of Other Courts Which Have Held That Unintentional Inadvertence In Missing A Grievance Procedure Deadline Does Not Constitute A Breach Of A Union's Duty Of Fair Representation. 14

II. THE SIXTH CIRCUIT'S DECISION DISRUPTS THE AMICABLE RESOLUTION OF WORKPLACE DISPUTES THROUGH A MECHANISM BOTH MANAGEMENT AND LABOR HAVE CHOSEN. 17

III. THE SIXTH CIRCUIT'S DECISION IS IN CONFLICT WITH DECISIONS OF THIS COURT INASMUCH AS IT HOLDS A UNION LIABLE IN A HYBRID FAIR/REPRESENTATION SUIT ABSENT A CONCOMITANT FINDING THAT THE EMPLOYER HAS BREACHED ITS CONTRACT. 20

Conclusion 21

Appendix

Opinion of the Court of Appeals for the Sixth Circuit, dated 2/15/98 . . . . . A1

Memorandum Opinion by the District Court, dated 4/17/96 . . . . . A-12

Judgment of the District Court, dated 4/15/96 . . . . . A-16

Order issued by the District Court on 1/24/95 . . . . . A-17

Order issued by the District Court on 1/31/95 . . . . . A-24

Order issued by the District Court on 2/6/95 . . . . . A-29

Marginal Order issued by the District Court on 3/7/95 . . . . . A-33

Order entered by the Sixth Circuit Court on rehearing, dated 4/9/98 . . . . . A-34

TABLE OF AUTHORITIES

Cases **Page**

Air Line Pilots Ass'n. v. O'Neill, 111 S.Ct. 1127 (1991) 11

Bellesfield v. RCA Communications, Inc., 675 F.Supp. 952 (D. N.J. 1987) 16

Boys Market v. Retail Clerks Union, 398 U.S. 235 (1970) 17

Chauffeurs, Teamsters & Helpers, Local 391 v. Terry, 494 U.S. 558 (1990) 20

Columbus Show Case Co. v. Sheet Metal Workers Int'l. Ass'n., 44 Lab. Arb. (BNA) 507 (Kates, Arb. 1965). 19

DelCostello v. International Brotherhood of Teamsters, 462 U.S. 151 (1983) 20

Flynn v. The Prudential Insurance Co. of America, 1996 U.S.Dist. LEXIS 7638 (S.D. N.Y. 1996) 15

Ford Motor Co. v. Huffman, 345 U.S. 330 (1953) 11

Garcia v. Zenith Elec. Corp., 58 F.3d 1171 (7th Cir. 1995) 15

Hill v. Sanford Corp., 1997 U.S. Dist. LEXIS 3713 (N.D. Ill. 1997) 15

Kent County, Michigan Dept. of Public Health v. Michigan Nurses Ass'n., Kent County Public Health Nurses Council, 75 Lab. Arb. (BNA) 948 (Kruger, Arb. 1980) 19

King v. New York Telephone Co., Inc., 785 F.2d 31 (2nd Cir, 1986) 16

Menasco Mfg. Co. v. International Ass'n. of Machinists, 45 Lab. Arb. (BNA) 502 (Boles, Arb. 1965) 19

Noble Bros., Inc. v. Local No. 358, Bakery & Confectionery Workers Union, 97 S.Ct. 1067 (1977); 17

Ohmer Corp. v. United Electrical, Radio & Machine Workers of America, Local 768, 5 Lab. Arb. (BNA) 278 (Lehoczky, Arb. 1946). 19

Perry v. Million Air, 943 F.2d 616 (6th Cir. 1991) 12

Quality Beer Distributors v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, 73 Lab. Arb. (BNA) 670 (Ziskind, Arb. 1979). 19

Riley v. Letter Carriers Local No. 380, 668 F.2d 224 (3rd Cir. 1981) 16

Ruzicka v. General Motors Corp., 523 F.2d 306 (6th Cir.), reh. denied, 528 F.2d 912 (6th Cir. 1975). 13

Ruzicka v. General Motors Corp., 649 F.2d 1207 (1981) 13

Tennessee Dressed Beef Co. v. United Food & Commercial Workers, 74 Lab. Arb. (BNA) 1229 (Hardin, Arb. 1980) 19

Trnka v. Local Union No. 688, 30 F.3d 60 (7th Cir. 1994) 15

Vaca v. Sipes, 386 U.S. 171 (1967) 10, 17, 20

Statutes

28 U.S.C. § 1254(1) 2
28 U.S.C. §§ 1331 8
28 U.S.C. § 1337 8
29 U.S.C. § 185(a) 2, 8

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1997

No. _____

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 18,
Petitioner,

v.

MICHAEL VENCL,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner, the International Union of Operating Engineers, Local 18, petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Sixth Circuit appears at 137 F.3d 420 (6th Cir. 1998).

The decision of the United States District Court for the Northern District of Ohio, Eastern Division, was not published.

JURISDICTION

The Judgment of the Court of Appeals was entered on February 25, 1998. The Court of Appeals' Order denying Petitioner Local 18's Petition for Rehearing was entered on April 9, 1998.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The statutory provision involved herein is 29 U.S.C. § 185(a) which provides:

> Suits for violations of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect

to the amount in controversy or without regard to the citizenship of the parties.

STATEMENT OF THE CASE

I. Statement Of The Facts

At the time giving rise to the allegations in the underlying Complaint, petitioner the International Union of Operating Engineers, Local 18, (hereinafter "Local 18" or the "Union"), was signatory to a Collective Bargaining Agreement with a former defendant named American High Reach, (hereinafter "AHR" or the "Company"). This Agreement covered respondent Michael Vencl. Article XXIII therein set forth the procedures by which employees of AHR could present grievances concerning the interpretation, application or violation of the parties' Agreement. If a grievance was unsuccessfully resolved at Steps 1 or 2, either party could request "final and binding" arbitration in accordance with Article XXIV.

Respondent was the beneficiary of these and other provisions beginning in 1978 when he was hired as an apprentice and became a member of Local 18. Over the years, respondent was promoted to the position of Field Service Technician wherein he was responsible for repairing machinery both in and out of the Company's Richfield, Ohio facility.

On or about March 8, 1993, respondent was injured at work when a large piece of equipment rolled over his foot. As a result of this injury, respondent left work, had his foot examined by medical personnel and,

following treatment, returned to work. On the following day, March 9, 1993, he reported to work with pain and swelling in his foot but told the Company that he might need to have his foot examined later that day. On the way to a road call in Erie, Pennsylvania that day, respondent stopped at his doctor's office to obtain additional medication. After examining respondent, the treating physician informed respondent that he could not work, instructed him to stay off his foot and prescribed a stronger anti-inflammatory agent.

When respondent next reported to work on March 12, 1993, AHR terminated him. The Union believed that respondent was discharged from employment without just cause. As a result, when respondent went to the Union Hall to file a grievance protesting his discharge, the Union's Business Representative Max McCormack and District Representative David Lumbatis helped him write up his grievance and instructed the Union's office clerical staff to type it.

Claiming that his termination constituted a breach of Local 18's Collective Bargaining Agreement with the Company, respondent filed a Grievance on March 17, 1993 seeking reinstatement with full back pay and benefits. Local 18 processed that Grievance through Article XXIII's grievance procedure, but the Company refused to reinstate respondent.

After the parties' Step 2 Grievance meeting, McCormack and Lumbatis asked respondent to come down to the Union Hall, where they had two (2) subsequent meetings with him. At one (1) of these

meetings, respondent learned that the Company had refused to reinstate him. However, respondent has admitted that McCormack and Lumbatis were not hostile to him, were appropriately businesslike and did not treat him any differently than they treated any other union members. In fact, respondent has also admitted that prior to the present case, his experiences with the Union, as either a member or Union Steward, were always businesslike, and whenever he had sought the Union's intervention, it responded in an appropriate fashion.

Max McCormack had verbally notified AHR of the Union's intent to arbitrate respondent's Grievance during the Step 2 grievance meeting. At the conclusion of Step 2 of the grievance procedure, the Company delivered its decision to the Union's office on March 22, 1993. Since, however, McCormack was on vacation from March 22 through March 28, 1993, he was unable to file a written arbitration demand within three (3) days of the employer's decision as required by Article XXIII of the parties' Contract. As a result, Dave Lumbatis sent by FAX a formal, written notice to AHR on March 26, 1993, requesting that respondent's Grievance be arbitrated pursuant to Article XXIV. This written request was technically one (1) day late.

Respondent's Grievance was thereafter arbitrated at a hearing before Impartial Arbitrator Roland Strasshofer on July 19, 1993. While not denying that the Union had given oral notice, the Company raised the timeliness of plaintiff's grievance as a bar to arbitration. However, the Arbitrator reserved judgment on this issue, and the parties presented evidence and arguments

addressed to both the issue of timeliness and the merits of the underlying grievance. During the Arbitration, respondent was represented by legal counsel retained and paid for by Local 18. Significantly, respondent admitted that his legal counsel questioned witnesses on direct and cross-examination and that he had no complaints regarding his legal representation at the hearing.

Following the hearing, Local 18 submitted a Post-Arbitration Brief, reiterating its positions at the hearing. Specifically, Local 18 argued that although the written arbitration demand was technically a day late, McCormack's absence during the critical time constituted sufficient and adequate reason to treat the demand as timely, especially since the Company already knew that the Union planned to arbitrate, and arbitration decisions only require substantial compliance with grievance procedures. Further, Local 18 argued that principles of estoppel and fairness compelled a decision on the merits inasmuch as the Company was not prejudiced by the late written arbitration demand.

Nevertheless, on September 24, 1993, Arbitrator Strasshofer denied respondent's Grievance on the ground that the written request for arbitration was untimely.

II. Statement Of The Case

As a result, on January 18, 1994, respondent filed a hybrid § 301/fair representation action against his former employer, AHR, and Local 18, alleging that AHR discharged him in violation of its Collective Bargaining Agreement and that the Union breached its duty of fair

representation in failing to timely demand in writing arbitration of respondent's grievance protesting his discharge.

In response, Local 18 filed a Motion to Dismiss and/or Strike on April 19, 1994. Therein, Local 18 argued that respondent's allegations against the Union did not state a claim of bad faith or arbitrary or discriminatory conduct necessary to sustain a cause of action for breach of the duty of fair representation. However, in a Memorandum and Order filed May 19, 1994, the District Court determined that the propriety of respondent's fair representation claim could not be determined solely on the pleadings.

Local 18 thus pursued discovery and filed a Motion for Summary Judgment on November 1, 1994. However, at a Status Hearing held on January 20, 1995, plaintiff filed an oral cross-motion for partial summary judgment against the Union, which the Court then indicated it would grant. In a subsequent Order filed January 24, 1995, the Court denied Local 18's Motion for Summary Judgment and formally granted respondent partial summary judgment against the Union.

Thereafter, respondent settled his claims with both AHR and Brambles Equipment Services, Inc., a successor to AHR, and filed Stipulations of Dismissal with prejudice. Respondent thereafter deleted AHR and Brambles from his lawsuit and filed a Second Amended Complaint solely against the Union.

In his Second Amended Complaint, respondent reiterated his prior allegation that Local 18 breached its duty of fair representation by failing to timely process his grievance to arbitration. Respondent alleged that the District Court had jurisdiction over his claim against the Union pursuant to § 301 of the Labor Management Relations Act (29 U.S.C. § 185), 28 U.S.C. §§ 1331 (governing federal question jurisdiction) and 28 U.S.C. § 1337 (governing federal jurisdiction over actions relating to commerce and antitrust).

In response, Local 18 filed a Motion to Dismiss the Second Amended Complaint. Therein, Local 18 argued that respondent could not maintain an action for breach of the collective bargaining agreement solely against the union under § 301 in the absence of the employer defendants. In addition, Local 18 maintained that the facts did not establish that the Union acted in bad faith or in an arbitrary or discriminatory manner so as to breach its duty of fair representation.

In a Memorandum Opinion filed on April 17, 1996, the District Court granted Local 18's Motion to Dismiss on the ground that it lacked subject matter jurisdiction under 28 U.S.C. § 1337 because respondent's claim against the Union was interdependent with his claim against his former employer such that it was required to be brought as a hybrid § 301/fair representation action which respondent could no longer pursue because of his settlement. The court also noted that the pleadings did not otherwise support a separate claim against Local 18.

Thereafter, on May 15, 1996, respondent filed a Notice of Appeal from that judgment to the Court of Appeals for the Sixth Circuit. On May 22, 1996, Local 18 timely

filed a Notice of Cross-Appeal from four (4) of the District Court's Orders. On appeal, the Sixth Circuit reversed the dismissal of respondent's union claims for lack of jurisdiction, affirmed partial summary judgment and an award of attorney fees in respondent's favor and remanded the case back to the District Court for a trial on the merits against Local 18.

Thereafter, Local 18 timely filed a Petition for Rehearing with Suggestion for Rehearing En Banc in the Court of Appeals on March 10, 1998. Therein, Local 18 argued that the Sixth Circuit Panel's decision was not only contrary to decisions of both this Court and its own Court but it was also in conflict with decisions of other federal circuit courts which hold that unintentional inadvertence in missing a grievance procedure deadline does not constitute a breach of a union's duty of fair representation. However, the Sixth Circuit rejected these arguments and issued an Order on April 9, 1998 denying Local 18's petition for rehearing. Local 18 thus timely petitions this Court to grant a writ of certiorari to review the Sixth Circuit Court's decision.

REASONS FOR GRANTING THE WRIT

I. CONTRARY TO ESTABLISHED PRECEDENT, THE SIXTH CIRCUIT PANEL'S DECISION IMPOSED A MANDATORY FILING DEADLINE AKIN TO A STATUTE OF LIMITATIONS UPON AN AGREED UPON GRIEVANCE PROCESS.

As set forth below, the Sixth Circuit's decision departed from established precedent of this Court, the Sixth Circuit Court of Appeals and other Courts in creating a bright line rule that procedural grievance process deadlines

are actually mandatory statutes of limitations which a union, (and arguably management), must meet or be held liable for breaching its duty of fair representation. Although various discovery and legal infirmity rules toll even the most stringent statutory and common law statutes of limitations, and parties to a criminal proceeding can waive jurisdictional time limits, the Sixth Circuit nevertheless broke new ground in converting the parties' grievance process into a compulsory code of conduct and refusing to acknowledge any recognized exceptions.

However, controlling decisions have declined to accord grievance process deadlines final and binding effect and instead recognize various exceptions on facts much less compelling that those in the present case. Inasmuch as Local 18 at best made a mistake in filing its written arbitration demand one (1) day late, this is not a case of a clear or even arguable breach by Local 18 of its duty of fair representation. The fact that Local 18's business representative had given notice of the Union's intent to arbitrate prior to the written filing deadline serves as an extenuating circumstance which distances this case from decisions where courts have held a union liable for breaching its duty of fair representation.

A. The Panel's Decision Holding Local 18 Liable For A Breach Of The Duty Of Fair Representation For Missing An Arbitration Deadline Is In Direct Conflict With Various Decisions Of This Court And The Sixth Circuit.

Over thirty (30) years ago in Vaca v. Sipes, 386 U.S. 171, 190 (1967), this Court held that a union breaches its duty of fair representation only when "a union's conduct

toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." More recently, in Air Line Pilots Ass'n. v. O'Neill, 111 S.Ct. 1127 (1991), this Court confirmed that a "union breaches its duty of fair representation if its actions are either arbitrary, discriminatory, or in bad faith...." More specifically, "a union's actions are arbitrary only if, in light of the factual and legal landscape at the time of the union's actions, the union's behavior is so far outside a 'wide range of reasonableness,' Ford Motor Co. v. Huffman, 345 U.S. 330, 338 (1953), as to be irrational." O'Neill, 111 S.Ct. at 1130. In addition, negligence and mistakes do not constitute a breach of the duty of fair representation. Id.

Paying only lip service to these time-honored principles, the Sixth Circuit Panel held that Local 18's conduct in filing a written request for arbitration of respondent's grievance one (1) day late constituted arbitrary conduct rather than an excusable mistake.[1] In doing so, the Sixth Circuit abrogated prior law of both this Court and the Sixth Circuit.

The Panel's decision hinged on the finding that Local 18 had no excuse for filing its arbitration demand a day late. To reach this erroneous conclusion, the Panel focused on the fact that Local 18's business representative was on vacation when the written request was due and acknowledged but then rejected the fact that Local 18 specifically requested

---

[1]The Panel did not consider or hold that Local 18's conduct was motivated by some form of discrimination. Nor did the Panel accuse Local 18 of bad faith filing either. Thus, the only prong of O'Neill which is at issue is arbitrariness.

arbitration of respondent's grievance prior to the expiration of the filing deadline. While other courts have also excused late filing in similar circumstances, (see discussion infra), the Sixth Circuit had previously absolved a union from a breach of the duty of fair representation where it had a good excuse like in the case at bar.

In Perry v. Million Air, 943 F.2d 616 (6th Cir. 1991), the Sixth Circuit held that a union did not act arbitrarily by allowing an arbitration deadline to pass without taking action on an employee's behalf. Id: at 619-20. What saved the Union in Perry was reliance on a local practice of treating grievance procedure deadlines as flexible. Id. at 620. If that excuse was sufficient, then the facts of this case are even more compelling. In contrast to Perry, where the Sixth Circuit Court excused the Union's inaction based on a post facto explanation, in this case, Local 18 gave the company oral notice of its intent to proceed to arbitration prior to the expiration of its much shorter deadline[2] and followed up with a written request the day after it was due. By refusing to acknowledge these facts as a legitimate excuse, both the Sixth Circuit's decision and the underlying District Court opinion stand in stark contrast to the black letter arbitration principle that grievances should be decided on their merits rather than on technicalities which prevent a meaningful resolution to employment disputes which affect an employee's livelihood.

Curiously, the Panel's decision never even mentioned Perry. Instead, the Panel relied solely upon the facts and

---

[2]In Perry, the Union had 30 days in which to seek arbitration. In contrast, Local 18 was required to request arbitration within three (3) working days.

holding in Ruzicka v. General Motors Corp., 649 F.2d 1207 (1981)(Ruzicka II), where a similar excuse prevailed. Ruzicka II holds that a union is relieved of liability for a breach of the duty of fair representation where a bargaining representative's failure to file an employee's grievance statement was due to reliance on the prevailing practice of freely granted extensions of time. Id. at 1211. On these facts, the Sixth Circuit remanded the case back to the district court with the instruction that if reliance was shown, then the Union's failure to file was neither "perfunctory," "inept," nor arbitrary. Id. at 1211-12. In so ruling, the Sixth Circuit went on to note that:

> [s]uch conduct, at times, manifests no more than ordinary negligence and we cannot hold a union liable for breach of the duty of fair representation based upon simple negligence.

Id. at 1212. Affirming the district court's underlying decision in Ruzicka I,[3] this Court held in Ruzicka II that it is only "unexplained union inaction" for which a union can be held liable in the Sixth Circuit. Id. at 1211.

As in Ruzicka II, simple negligence is all that occurred in the present case. The Local 18 business representative handling respondent's grievance just happened to start a week-long vacation the day the Company delivered its Step 2 response to the Union on March 22, 1993. Although that delivery started the time running within which to request arbitration in writing, the Union has already

---

[3]Ruzicka I is cited as Ruzicka v. General Motors Corp., 523 F.2d 306 (6th Cir.), reh. denied, 528 F.2d 912 (6th Cir. 1975).

advised the Company that it intended to take respondent's grievance to final and binding arbitration.

It bears discussion that had the Company tendered its Step 2 response to the Union the prior Friday, when Local 18's representative was still at work, Local 18 could have filed a written arbitration demand that day, this case would never have been arbitrated as to timeliness, the arbitrator would never have thrown out respondent's grievance as untimely, and respondent could have arbitrated the merits of his discharge. This scenario demonstrates the inequity in holding a union liable for simple inadvertence.

Because of the similarity of the facts in the present case to those in both Perry and Ruzicka II, the Sixth Circuit Court Panel's decision departed from previously established Sixth Circuit precedent under which Local 18 could not be held liable for a breach of the duty of fair representation. Specifically, the Panel's decision violated a well-established, fifteen (15) year old principle that a union does not breach its duty of fair representation when it has a "justification or excuse" for missing a grievance deadline. Ruzicka II, 649 F.2d at 1211.

B. The Sixth Circuit Court Panel's Decision Is In Conflict With Decisions Of Other Courts Which Have Held That Unintentional Inadvertence In Missing A Grievance Procedure Deadline Does Not Constitute A Breach Of A Union's Duty Of Fair Representation.

In addition to its inherent conflict with prior decisions of this Court and Sixth Circuit, the Panel's decision also conflicts with decisions of other courts, which have held that

unintentional inadvertence in missing a grievance procedure deadline, especially where, as here, notice of intent to arbitrate was given prior to the cut-off, does not constitute a breach of a union's duty of fair representation.

Perhaps the most significant case which is virtually "on all fours" with the issues at bar derives from the Seventh Circuit in Hill v. Sanford Corp., 1997 U.S. Dist. LEXIS 3713 (N.D. Ill. 1997). Therein, the court held that a terminated employee could not prevail on his fair representation claim against a union which missed a written arbitration deadline because the union gave "verbal" notice of intent to arbitrate prior to the deadline and only months later followed up with a letter to "cover" the prior request to arbitrate. Id. at *3-5. There, the Court relied on the Seventh Circuit's recent decisions in Trnka v. Local Union No. 688, 30 F.3d 60, 61 (7th Cir. 1994) and Garcia v. Zenith Elec. Corp., 58 F.3d 1171, 1176 (7th Cir. 1995), respectively, that the arbitrariness prong of the Supreme Court's O'Neill test is "quite forgiving," and only an "egregious disregard for the rights of union members" constitutes a breach of the duty of fair representation. Id. at *12-13. In view of these authorities and the facts, the Hill Court held that missing an arbitration deadline is "hardly the stuff of egregiousness." Id. at *17. The same is true of the present case, where Local 18's conduct was at best negligent, but not egregious.

A similar result obtained in a district court within the second Circuit. In Flynn v. The Prudential Insurance Co. of America, 1996 U.S.Dist. LEXIS 7638, *13-14 (S.D. N.Y.

1996),[4] the court recently held that a union which made "tactical errors" in missing two (2) grievance procedure deadlines and refused to seek arbitration could not be liable for a breach of the duty of fair representation because the Union's conduct at best evidenced simple negligence. See also Bellesfield v. RCA Communications, Inc., 675 F.Supp. 952 (D. N.J. 1987)(mistake in prosecution of grievance, negligence or ineptitude do not constitute a breach of the duty of fair representation).

Furthermore, expressly relying on Ruzicka II in Riley v. Letter Carriers Local No. 380, 668 F.2d 224 (3rd Cir. 1981), the Third Circuit held that neither mere ineptitude nor negligence show a breach of the duty of fair representation where a union did not pursue a grievance based upon an agreement to hold grievances in abeyance. Id. at 228-29. These decisions make clear that Local 18's conduct does not constitute a breach of the duty of fair representation.

---

[4]At a minimum, the Second Circuit has held that summary judgment is inappropriate where there are questions of fact as to whether an employee-grievant knew about the contractual time limit for requesting arbitration and that the union had not done anything to preserve his right to arbitration. King v. New York Telephone Co., Inc., 785 F.2d 31, 34 (2nd Cir, 1986). Because of different factual disputes in the case at bar, summary judgment for the plaintiff was likewise inappropriate.

II. THE SIXTH CIRCUIT'S DECISION DISRUPTS THE AMICABLE RESOLUTION OF WORKPLACE DISPUTES THROUGH A MECHANISM BOTH MANAGEMENT AND LABOR HAVE CHOSEN.

Not only have prior judicial decisions declined to take the hard and intractable approach to grievance deadlines as did the Sixth Circuit Panel, but the Panel's decision also disrupts the amicable resolution of workplace disputes through a mechanism both management and labor have chosen in lieu of expensive and time-intensive litigation.

As this Court held in Vaca v. Sipes, 386 U.S. 171, 191 (1967), Congress declared in enacting the Labor Management Relations Act that the "[f]inal adjustment by a method agreed upon by the parties is...the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement." See also Noble Bros., Inc. v. Local No. 358, Bakery & Confectionery Workers Union, 97 S.Ct. 1067, 1073-74 (1977); Boys Market v. Retail Clerks Union, 398 U.S. 235 (1970). Under this process, both the employer and the union "contemplate that each will endeavor in good faith to settle grievances short of arbitration" and dispose of frivolous grievances prior thereto. Vaca, 386 U.S. at 191. Perhaps more importantly, the grievance process assures that:

> similar complaints will be treated consistently, and major problems in the interpretation of the collective bargaining contract can be isolated and perhaps resolved. And finally, the settlement process furthers the interest of the union as statutory agent and coauthor of the bargaining agreement in representing employees in the enforcement of that agreement.

Id.

In contrast to this reasoning, both labor and management suffer from the Sixth Circuit's decision because it renders their grievance procedure a virtual nullity. Held to the Panel's bright line test, a Union is prevented from performing its fiduciary responsibility to fairly represent its numbers on the merits of their grievances. The Panel's decision also stands as a complete bar to an employee's right to have the union process his or her grievance. This in turn excludes employees from receiving the benefits of union membership they expect when they join the union.

The employer fares no better under the Panel's decision when a union misses a grievance procedure deadline. If a union is held to a statute of limitations, the employer does not receive what it bargained for, to wit, an effective and economical process for resolving contractual disputes without creating a contentious and litigious relationship with its employees and the union. On the one (1) hand, the employer risks significant exposure and expense in a contract breach case under § 301 if it challenges the arbitrability of a grievance on timeliness grounds and prevails. On the other hand, if an employer remains silent, thereby waiving the defense of timeliness, it has lost the opportunity to present a full defense, and the grievance and arbitration process becomes perfunctory. The Sixth Circuit's decision inevitably places the employer in between its own private scylla and charybdis. And, if the shoe were on the other foot, the employer would forever lose its rights in the grievance process by filing an untimely response.

The Sixth Circuit's decision also puts form over substance at the expense of the employee foreclosed by a

technical timeliness bar from challenging his or her discipline or discharge in the arbitral arena.

Finally, the Sixth Circuit's decision also vitiates the operation and implication of negotiation, renegotiation, past practice, course of dealing, side agreements, re-opener clauses, express and implied waivers, equity and estoppel. All of these doctrines are common reasons why arbitrators only require substantial, rather than absolute, compliance with grievance procedures. See e.g. Menasco Mfg. Co. v. International Ass'n. of Machinists, 45 Lab. Arb. (BNA) 502, 504 (Boles, Arb. 1965); Columbus Show Case Co. v. Sheet Metal Workers Int'l. Ass'n., 44 Lab. Arb. (BNA) 507, 510-12 (Kates, Arb. 1965).

By holding to the contrary, the Sixth Circuit has in effect usurped the role of arbitrators who refuse to require strict compliance with contractual time limits where it would be unreasonable. Kent County, Michigan Dept. of Public Health v. Michigan Nurses Ass'n., Kent County Public Health Nurses Council, 75 Lab. Arb. (BNA) 948, 951 (Kruger, Arb. 1980); Tennessee Dressed Beef Co. v. United Food & Commercial Workers, 74 Lab. Arb. (BNA) 1229, 1236 (Hardin, Arb. 1980); Quality Beer Distributors v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, 73 Lab. Arb. (BNA) 670, 671 (Ziskind, Arb. 1979); Ohmer Corp. v. United Electrical, Radio & Machine Workers of America, Local 768, 5 Lab. Arb. (BNA) 278, 280 (Lehoczky, Arb. 1946)(essential party is unavoidably absent thus making the observance of time limits impossible).

III. THE SIXTH CIRCUIT'S DECISION IS IN CONFLICT WITH DECISIONS OF THIS COURT INASMUCH AS IT HOLDS A UNION LIABLE IN A HYBRID FAIR/REPRESENTATION SUIT ABSENT A CONCOMITANT FINDING THAT THE EMPLOYER HAS BREACHED ITS CONTRACT.

Finally, the Sixth Circuit Court Panel's decision awarding summary judgment against Local 18 also departs from well-established precedent of this Court by allowing a union to be held liable in a hybrid § 301/fair representation suit without a concomitant finding that the employer has breached its contract. While the Panel acknowledged that this is a hybrid action, it nevertheless lost track of the cardinal rule in hybrid actions, to wit, that regardless of whether a plaintiff sues both his union and employer or only one (1) of those entities, in order to recover money damages on any of his claims, his case is the same: "he must prove the same two facts: that the employer's action violated the terms of the collective bargaining agreement and that the union breached its duty of fair representation." Chauffeurs, Teamsters & Helpers, Local 391 v. Terry, 494 U.S. 558, 564 (1990). This doctrine has been the absolute rule in hybrid actions since this Court decided Vaca v. Sipes, 386 U.S. 171, 187 (1967) in 1967.

While the Panel cited DelCostello v. International Brotherhood of Teamsters, 462 U.S. 151, 165 (1983), the Panel nonetheless departed from Vaca and its progeny by holding Local 18 liable without also showing or holding that AHR was concomitantly liable.

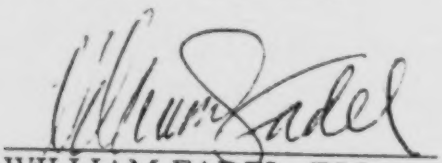
By solely holding Local 18 liable for breaching its duty and awarding respondent attorney fees on that basis, the

Panel put the proverbial 'cart before the horse.' What this means is that if the Company properly discharged respondent, then the Union's failure to file a timely written request for arbitration was harmless; i.e., even a timely arbitration demand would not have changed anything because respondent would never have gotten his job back were the arbitrator to have reached the merits of his discharge grievance. This conclusion merely states the obvious inconsistency of holding a Union liable for breaching its duty of fair representation where it has no power to reinstate a properly discharged employee, thus the reason for this Court's rules.

CONCLUSION

For all of the foregoing reasons, petitioner, the International Union of Operating Engineers, Local 18, respectfully requests this Court to issue a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,



WILLIAM FADEL, ESQ.
Counsel of Record
KATHLEEN M. SASALA, ESQ.
WULIGER, FADEL & BEYER
1340 Sumner Court
Cleveland, Ohio 44115
(216) 781-7777

Counsel for Petitioner Local 18

APPENDIX

Michael VENCL, Plaintiff-Appellant/Cross-Appellee,

v.

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 18, Defendant-Appellee/Cross-Appellant.

Nos. 96-3567, 96-3614.

United States Court of Appeals,
Sixth Circuit.

Argued Oct. 20, 1997.

Decided Feb. 15, 1998.

James W. Tekavec (argued and briefed), Cleveland, OH, for Michael Vencl.

William Fadel (argued and briefed), Kathleen M. Sasala (briefed), Wuliger, Fadel & Beyer, Cleveland, OH, for International Union of Operating Engineers, Local 18.

Before: SILER, BATCHELDER, and GIBSON,* Circuit Judges.

* The Honorable John R. Gibson, Circuit Judge of the United States Court of Appeals for the Eighth Circuit, sitting by designation.

OPINION

SILER, Circuit Judge.

The plaintiff, Michael Vencl, filed a hybrid § 301 breach of contract/fair representation suit against his former employer, American High Reach, Inc. and its successor, Brambles Equipment Services, Inc. (collectively, "AHR"), and his union, the International Union of Operating Engineers, Local 18 ("Local 18"). In two prejudgment rulings, the district court granted Vencl partial summary judgement against Local 18 and ruled that he could recover attorneys' fees from it. After Vencl settled with AHR, the district court dismissed his suit against Local 18 for lack of subject matter jurisdiction. Vencl appeals the dismissal, and Local 18 cross-appeals both prejudgment rulings. We REVERSE the district court's dismissal for lack of jurisdiction and AFFIRM both prejudgment rulings.

I. Background

In 1993, AHR fired Vencl after a large piece of equipment rolled over his foot. Vencl filed a grievance with Local 18 pursuant to Local 18's collective bargaining agreement with AHR. AHR denied the grievance, and Local 18 orally informed AHR that it would seek to arbitrate. Under the terms of the collective bargaining agreement, however, oral notice was insufficient. To preserve the right to arbitrate,

Local 18 had to request arbitration "in writing within three (3) working days" of AHR's denial. Local 18 missed the deadline. It formally requested arbitration one day late, because its business representative had gone on vacation. The arbitrator denied Vencl's grievance solely because Local 18 filed its request too late.

Soon thereafter, Vencl filed a hybrid § 301 breach of contract/fair representation suit against AHR and Local 18. Vencl claimed that AHR wrongfully discharged him and that Local 18 breached its duty to represent him fairly. In two prejudgment rulings, the district court ruled in favor of Vencl over Local 18. The court granted Vencl partial summary judgment on the breach of duty issue, and later held that Vencl could recover attorneys' fees form Local 18. Vencl eventually settled his claim against AHR for $20,000. The agreement purported to settle all of Vencl's claims for compensatory damages due to AHR's conduct, but also acknowledged that AHR continued to deny any wrongdoing and that Vencl was not a "prevailing party." Vencl then voluntarily dismissed his claims against AHR.

After settling with AHR, Vencl filed an amended complaint solely against Local 18. Although AHR was no longer a party, Vencl's complaint continued to allege that AHR improperly fired him "in violation of a collective bargaining agreement." Vencl sought legal fees and other damages for Local 18's representation breach. The amended complaint offered three grounds for jurisdiction, § 301 of the Labor Management Relations Act (codified as 29 U.S.C. § 185(a)), 28 U.S.C. § 1337, and 28 U.S.C. § 1331.

Pursuant to FED. R. CIV. P. 12(h)(3), the district court granted Local 18's motion to dismiss for lack of jurisdiction. The court noted that a hybrid § 301 suit includes two

elements: (1) that the employer breached a collective bargaining agreement, and (2) that the union breached its duty of fair representation. It held that Vencl could not establish the first element because he had dismissed AHR as a party. It also noted that a § 1337 suit involves a claim solely against the union, exclusive of any claim that the employer breached a collective bargaining agreement. The court held that no jurisdiction could lie under § 1337 because Vencl alleged that AHR violated the collective bargaining agreement. Vencl appeals this dismissal, and Local 18 cross-appeals the preliminary rulings.[1]

II. Standards of Review

We review Rule 12 motions and summary judgment motions *de novo. Barrett v. Harrington,* 130 F.3d 246, 251 (6th Cir.1997). With respect to summary judgment motions, we view the evidence in the light most favorable to the party opposing summary judgment. *Tinker v. Sears, Roebuck & Co.*, 127 F.3d 519, 521 (6th Cir.1997). We affirm summary judgment only if the submissions show "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c).

III. Jurisdiction

A hybrid §301 suit implicates the interrelationship among a union member, his union, and his employer. *White v. Anchor Motor Freight, Inc.*, 899 F.2d 555, 561 (6th

---

[1] The district court never addressed whether jurisdiction could lie under § 1331, and Vencl does not offer § 1331 as a jurisdictional basis on appeal.

Cir.1990). Under § 301, jurisdiction exists when a union member alleges a breach of a collective bargaining agreement:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce... may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

29 U.S.C. § 185(a). To recover against a union under § 301, the union member must prove both (1) that the employer breached the collective bargaining agreement and (2) that the union breached its duty of fair representation. *White,* 899 F.2d at 559. These are "the two constituent claims in every hybrid 301 action." *Id.* If the union member fails to prove that the union breached its duty, he will, obviously, recover nothing from the union. If the union member fails to prove that the employer breached the collective bargaining agreement, he also will recover nothing because the union member's grievance would have failed regardless of the union's representation.

Section 1337, on the other hand, confers jurisdiction over cases involving the independent relationship between the union member and his union, without regard to a collective bargaining agreement. *See, e.g., Breininger v. Sheet Metal Workers Int'l Ass'n Local Union No.* 6, 493 U.S. 67, 83, 110 S.Ct. 424, 434, 107 L.Ed.2d 388 (1989). Under § 1337, jurisdiction exists where a cause of action arises under a congressional act regulating commerce:

> The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies....

28 U.S.C. § 1337(a). Section 1337 provides jurisdiction for fair representation suits because the duty of fair representation derives from the National Labor Relations Act ("NLRA"), and the NLRA is an "Act of Congress regulating commerce." *Breininger*, 493 U.S. at 83, 110 S.Ct. at 434 (citations omitted). In this context, the "fair representation claim is a separate cause of action from any possible suit against the employer." *See id.* at 84, 110 S.Ct. at 435. In *Breininger*, for example, the employee alleged that the union represented him unfairly by refusing to refer him to potential employers. The union's breach did not implicate a collective bargaining agreement. *See id.* at 71-72, 110 S.Ct. at 427-29. *See also Storey v. Local 327, Int'l Brotherhood of Teamsters*, 759 F.2d 517, 523 (6th Cir. 1985) (holding that § 1337 provides the jurisdictional basis for fair representation suits where no collective bargaining agreement exists).

Therefore, § 301 and § 1337 provide different jurisdictional bases depending on whether the controversy involves a breach of the collective bargaining agreement in addition to a breach of the duty of fair representation. Where the union member produces a "colorable allegation" that the employer breached a collective bargaining agreement, however, jurisdiction lies under § 301, not § 1337. *See White*, 899 F.2d at 561. In *White*, the employee was fired over a major accident. The employee lost his grievance because an arbitrator found that the collective bargaining agreement clearly allowed discharge over major accidents. The employee subsequently claimed that the union had breached its duty of fair representation, and claimed both

§ 301 and § 1337 as jurisdictional bases. The court rejected § 301 as a basis because, given the clarity of the collective bargaining agreement, the employee could not prove that the employer had breached it. *Id.* at 560-61. The court also rejected § 1337 as a basis because the cause of action was "a quintessential hybrid 301 claim," in that it necessarily implicated the collective bargaining agreement. *Id.* at 561-62. The employee had alleged both that the union breached its duty of fair representation and that the employer breached the collective bargaining agreement by firing him. The court stressed that "[i]f the essential nature of [the employee's] complaint were overlooked, then future plaintiffs would be encouraged to adopt [his] approach and circumvent the [] rule simply by artfully pleading 28 U.S.C. § 1337 as a jurisdictional basis." *Id.* at 562. *Cf. Pratt v. United Auto, Aerospace and Agric. Implement Workers, Local 1435,* 939 F.2d 385, 389-90 (6th Cir.1991) (explaining rule, and holding § 1337 confers jurisdiction where employee never alleged that employer breached the collective bargaining agreement).

Here, the district court correctly held that no jurisdiction lies under § 1337. Vencl's suit is a quintessential hybrid § 301 claim. Paralleling *White*, Vencl alleges facts to support an inference that AHR violated the collective bargaining agreement by firing him over an accident. Indeed, Vencl based his claim on § 301 before settling with AHR, his amended complaint continues to allege that AHR breached the collective bargaining agreement, and he initially filed a grievance under that agreement.

The district court, however, should have exercised jurisdiction under § 301. Unlike the situation in *White*, the arbitrator in this case never reached the merits of Vencl's grievance. He dismissed the grievance solely because Local

18 requested arbitration too late. Therefore, Vencl could have presented facts to establish that AHR breached the collective bargaining agreement, thereby satisfying the first element necessary for jurisdiction under § 301.

Moreover, and contrary to the district court's holding, Vencl could establish that AHR breached the collective bargaining agreement despite settling with AHR and dismissing it as a party. In a hybrid § 301 suit, an "employee may, if he chooses, sue one defendant and not the other; but the case he must prove is the same whether he sues one, the other, or both." *DelCostello v. International Brotherhood of Teamsters,* 462 U.S. 151, 165, 103 S.Ct. 2281, 2291, 76 L.Ed.2d 476 (1983). While the settlement would render any suit by Vencl against AHR moot because Vencl could recover no damages from AHR, nothing precludes Vencl from proving that AHR breached the collective bargaining agreement in a suit against other defendants. The settlement states only that AHR denies wrongdoing, not that Vencl somehow waives the right to prove that AHR engaged in wrongdoing.

Local 18 argues that AHR's dismissal presents numerous practical problems, in that Vencl and Local 18 will have to litigate AHR's alleged breach without AHR as a party. Nonetheless, these practical problems do not deprive a federal court of subject matter jurisdiction. AHR's absence will not materially prejudice Local 18. *See Czosek v. O'Mara*, 397 U.S. 25, 29, 90 S.Ct. 770, 773, 25 L.Ed.2d 21 (1970) (in case involving the Railway Labor Act, allowing suit solely against union partially because the "union defendants will not be materially prejudiced by the possible absence of the [employer] as a codefendant at trial"). Moreover, in several cases, courts have continued to adjudicate hybrid § 301 cases after dismissing the employer

as a party. *See Beyene v. Coleman Sec. Serv. Inc.*, 854 F.2d 1179, 1180-81 (9th Cir.1988) (where employee settled with employer, court continued to adjudicate § 301 case against union alone); *Self v. Drivers, Chauffeurs, Warehousemen and Helpers Local Union No. 61*, 620 F.2d 439, 444 (4th Cir.1980) (after granting employer summary judgment, adjudicating § 301 case against union alone). Because jurisdiction lay under § 301, we reverse this portion of the district court's decision.[2]

IV. Partial Summary Judgment

The NLRA imposes a duty of fair representation upon unions. *Storey v. Local 327, Int'l Brotherhood of Teamsters*, 759 F.2d 517, 518 (6th Cir.1985). A union breaches that duty by acting arbitrarily. *Ruzicka v. General Motors Corp.*, 649 F.2d 1207, 1209 (6th Cir.1981) (*"Ruzicka II"*). A union acts arbitrarily by failing to take a basic and required step. *Id.* at 1211. Timely filing is both basic and required. In *Ruzicka II*, the union failed to file a timely grievance. The

---

[2] Apparently, some dispute exists over whether employers are indispensable parties within the meaning of Fed. R. Civ. P. 19. *Compare Kaiser v. Local No. 83*, 577 F.2d 642, 644 (9th Cir.1978) (employer is not an indispensable party in a hybrid § 301 suit) with *Kress v. Local No. 776, Int'l Brotherhood of Teamsters*, 42 F.R.D. 643, 647 (M.D.Pa.1967) (employer is an indispensable party). We need not decide this issue because the parties did not argue it, although most cases agree with *Kaiser*. *See Terry v. Chauffeurs, Teamsters and Helpers, Local 391*, 81 B.R. 394, 397 (M.D.N.C. 1987) (noting that "employers and unions are generally not considered indispensable parties").

court noted that "absent justification or excuse, a union's negligent failure to take a basic and required step, unrelated to the merits of the grievance, is a clear example of arbitrary and perfunctory conduct which amounts to unfair representation." *Id.* (citation omitted). As an example of a viable excuse, the court held that the union's untimely filing could be excused if a prior course of dealing reasonably indicated that the employer would accept a late filing. *Id.*

Here, Local 18 requested arbitration one day late, and the arbitrator denied Vencl's grievance solely because of untimely filing. By way of excuse, Local 18 claims that it filed late only because its business representative had gone on vacation. This is not a reasonable excuse. *Ruzicka II* excuses only reasoned conduct, not irresponsible inattention. Next, Local 18 claims that it acted in good faith. *Ruzicka II,* however, specifically held that unions can unfairly represent members even when they act without bad faith. *Id.* at 1209. We affirm partial summary judgment in Vencl's favor.[3]

V. Attorneys' Fees

In a hybrid § 301 suit, the employer and the union are liable "according to the damage caused by the fault of each." *Vaca v. Sipes,* 386 U.S. 171, 197, 87 S.Ct. 903, 920, 17 L.Ed.2d 842 (1967). When a union breaches its duty of fair representation, a member can recover expenses, including

---

[3] Local 18 also argues that the district court improperly granted Vencl's motion for partial summary judgment orally, without sufficient time for briefing. Because the district court considered Local 18's motion for reconsideration, Local 18 suffered no prejudice from the oral order.

attorneys' fees and costs, incurred in pursuing his claims against the employer. *Scott v. Local Union 377, Int'l Brotherhood of Teamsters*, 548 F.2d 1244, 1246 (6th Cir.1977); *Self v. Drivers, Chauffeurs, Warehousemen and Helpers Local Union No. 61*, 620 F.2d 439, 444 (4th Cir.1980). These expenses are the damages flowing from the union's breach; if the union had fulfilled its duty, the member would not have had to spend his own resources. Therefore, these damages do not violate the traditional American rule regarding attorneys' fees. *Scott*, 548 F.2d at 1246. The American rule only prevents the union member from recovering resources spent in pursuing his claims against the union. *See id.*

Here, the district court correctly ruled that Vencl may recover expenses incurred in pursuing his claims against AHR. Vencl incurred those costs because Local 18 breached its duty. Moreover, Vencl may recover these costs despite settling with AHR. Local 18, not AHR, caused Vencl to bear the expense of pursuing his claims against AHR; therefore, the settlement would not include those costs. Local 18 must pay for its own breach.

Therefore, we AFFIRM the partial summary judgment entered on behalf of Vencl against Local 18 and the award of attorneys' fees, but we REVERSE the dismissal for lack of jurisdiction and REMAND for further proceedings consistent with this decision.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF OHIO

MICHAEL VENCL,	**) CASE NO. 5:94CVO109**
Plaintiff,	**)**
	) JUDGE
	) PETER C. ECONOMUS
v.	**)**
	)
INTERNATIONAL	**) MEMORANDUM OPINION**
UNION OF OPERATING	**) APRIL 17, 1996**
ENGINEERS,	**)**
LOCAL 18,	**)**
Defendant.	**)**

This is a "hybrid §301 case" in which the plaintiff, Michael Vencl (Vencl) alleges a beach of a collective bargaining agreement by his employer, Defendant American High Reach (AHR), and a breach of the duty of fair representation by his union, Defendant, International Union of Operating Engineers, Local 18 (Local 18). Local 18 has filed this motion to dismiss Vencl's Second Amended Complaint pursuant to Fed.R.Civ.P. 12. Because the Court is without jurisdiction, it must dismiss the case.

Vencl was employed by AHR beginning in 1978 as an apprentice. On March 8, 1993, Vencl was injured at work when a large piece of equipment rolled over his foot. When he returned to work on March 12, 1993, he was terminated. As a result of the termination, Vencl filed a grievance pursuant to the contract between the union and the employer complaining that his termination violated the contract and that he should be reinstated with full back pay and benefits. Local 18 processed the grievance pursuant to Article XXIII

of the Collective Bargaining Agreement. AHR denied the grievance. It was then presented to an arbitrator and on September 24, 1993, the arbitrator denied the grievance on the grounds that the request for arbitration by Local 18 was untimely.

On January 18, 1994, Vencl filed a hybrid §301/fair representation action against AHR and Local 18. He alleged that AHR discharged him in breach of the Collective Bargaining Agreement and that Local 18 breached its duty of fair representation in failing to timely demand arbitration of Vencl's grievance protesting the discharge. Vencl has since settled his claim against AHR and its successor, Brambles Equipment Services, Inc. In his Second Amended Complaint, he seeks from Local 18 damages including back pay, fringe benefits, reinstatement or alternatively front pay, compensatory damages, costs, and attorney's fees.

Vencl has filed this action pursuant to Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185(a). Section 301 provides as follows:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

29 U.S.C. § 185(a).

Under this statute, an aggrieved employee may bring a hybrid § 301/fair representation suit. A hybrid § 301 action involves two constituent claims; (1) an employer's breach of a collective bargaining agreement, and (2) a breach of a union's duty of fair representation. It is well-settled that "if the first claim anchored in the employer's breach of the collective bargaining agreement fails, then the breach of fair representation claim against the union must necessarily fail with it." White v. Anchor Motor Freight, Inc. 899 F.2d 555, 559 (6th Cir. 1990). Unless the plaintiff demonstrates both violations, he cannot succeed against either party. Bagsby v. Lewis Bros, Inc. of Tennessee, 820 F.2d 799, 801 (6th Cir. 1987). A hybrid § 301 action thus involves a triangular relationship encompassing a union member, his union, and his employer. White, 899 F.2d at 561, n.8.

As the Court in White also stated, federal courts have jurisdiction to hear fair representation suits whether or not they are accompanied by claims against the employers. Breininger v. Sheet Metal Workers International, 493 U.S. 67, 83, 110 S.Ct. 424, 434, 107 L.Ed.2d 388 (1989). Such independent suits have 28 U.S.C. § 1337 as a jurisdictional basis, rather than § 301. See, Storey v. Local 327, International Brotherhood of Teamsters, 759 F.2d 517, 523 (6th Cir. 1985). However, where the employee alleges a breach of the collective bargaining agreement along with a breach of the duty of fair representation, "the interrelationship between a union member, his union, and his employer is implicated." White, 899 F.2d at 561. As such, the employee in such a case cannot "circumvent the Bagsby rule simply by artfully pleading 28 U.S.C. § 1337 as a jurisdictional basis and casting their duty of fair representation claims as independent causes of action in what are, in substance, hybrid § 301 claims." Id. at 562. Accordingly, jurisdiction cannot be asserted under 28 U.S.C.

§ 1337 in this case as Vencl's claim is not solely a breach of fair representation claim but is a hybrid § 301 claim involving the interrelationship of Vencl, his employer and Local 18.

Moreover, the settlement reached between Vencl and Hohlfelder [sic] dismisses the employer from the lawsuit and destroys the "triangular relationship." Without the employer *and* the union in the case, the plaintiff cannot establish the two interdependent claims necessary to a hybrid § 301 cause of action. The settlement precludes any further implication of the employer in the suit and the pleadings do not support a separate claim against the union. Consequently, this Court no longer has jurisdiction over the action.

While many issues have been raised within the defendant's motion to dismiss, this Court's decision is based on a lack of jurisdiction and not for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6). Therefore, in considering any facts as alleged outside of the pleadings, the defendant's motion is not treated as a motion for summary judgment but rather the court dismisses the action pursuant to Fed. R. Civ. P. 12 (h)(3).

For these reasons, Defendant's Motion to Dismiss is granted.

IT IS SO ORDERED.

DATED: April 15, 1996

_____

Peter C. Economus
United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO

MICHAEL VENCL, Plaintiff,	)	CASE NO. 5:94CVO109
	)	JUDGE
v.	)	PETER C. ECONOMUS
INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 18, Defendant.	)	JUDGMENT

In accordance with the memorandum opinion this day filed, the Court concludes that it is without subject matter jurisdiction. Pursuant to Fed. R. Civ. P 12(h)(3), Defendant's Motion to Dismiss (Dkt. #84) is **GRANTED** and this case is **DISMISSED** at plaintiff's costs.

IT IS SO ORDERED

DATED: April 15, 1996

Peter C. Economus
United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

MICHAEL VENCL	:	Case No. 5:94-CV-109
	:	
Plaintiff,	:	JUDGE O'MALLEY
	:	
v.	:	ORDER
	:	
AMERICAN HIGH REACH, INC., et al.	:	January 24, 1995
	:	
Defendants.	:	

This is a "hybrid §301 case," brought by a union worker (Michael Vencl) against his employer (American High Reach) and his union (Operating Engineers Local 18). Currently pending are the following written motions: (1) Local 18's motion for summary judgment (docket no. 26); (2) American High Reach's motion for summary judgment (docket no. 27); and (3) American High Reach's motion for judgment on the pleadings (docket no. 14). Also pending is a cross-motion for partial summary judgment, made orally by plaintiff during pretrial proceedings on January 20, 1995.

For the reasons set forth below, the Court rules on these motions as follows: (1) Local 18's motion for summary judgment (docket no. 26) is DENIED; (2) American High Reach's motion for summary judgment (docket no. 27) is DENIED; (3) American High Reach's motion for judgment on the pleadings (docket no. 14) is DENIED as moot; and (4) Vencl's oral cross-motion for partial summary judgment is GRANTED.

I.

The denial of American High Reach's motion for judgment on the pleadings (docket no. 14) as moot is essentially a matter of housekeeping. Previously in this case, Local 18 filed a motion to dismiss and motion to strike prayer for extra-contractual damages (docket no. 13). American High Reach filed a companion motion, adopting the union's arguments as its own. Judge White, who presided over this case before it was transferred to Judge O'Malley, properly denied Local 18's motion to dismiss and granted the motion to strike prayer. Order dated May 19, 1994. However, Judge White's Order did not address American High Reach's companion motion. Accordingly, the Court denies American High Reach's motion for judgment on the pleadings as moot.

II.

Local 18 has filed a summary judgment motion, and American High Reach again filed a motion adopting the union's arguments. The basis for these motions is defendants' claim that Local 18's actions were not arbitrary, discriminatory, or in bad faith, and thus that Local 18 did not breach its duty of representation.

The facts are not in dispute, After Vencl filed his grievance with Local 18, Local 18 failed to seek arbitration on Vencl's behalf within 3 days, as required. Local 18 essentially admits that its failure was not a considered decision not to pursue Vencl's grievance. Indeed, Local 18 states even now that it believes Vencl's grievance is meritorious. Rather, the Local 18 representative responsible for filing for arbitration of Vencl's grievance was on vacation during the critical time period, so that no union

representative requested arbitration before the filing deadline. Vencl's arbitration request was finally filed a day late. The arbitrator denied the grievance solely for lack of timely filing.

Vencl, who must show that Local 18's actions were either "arbitrary, discriminatory, or in bad faith" to prevail, argues that Local 18's failure to timely demand arbitration was "arbitrary." Local 18 responds that it may have been negligent, but mere negligence is not "arbitrary" action. The parties agree that this issue is ripe for judgment by the Court.[1]

III.

Federal Rule of Civil Procedure 56(c) governs summary judgment motions and provides:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law ...

Rule 56(e) specifies the materials properly submitted in connection with a motion for summary judgment:

---

[1]The issue of whether American High Reach improperly discharged Vencl is not placed before the Court by the parties' cross-motions for summary judgment.

> Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein... The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denial of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

However, the movant is not required to file affidavits or other similar materials negating a claim on which its opponent bears the burden of proof, so long as the movant relies upon the absence of the essential element in the pleadings, depositions, answers to interrogatories, and admissions on file. Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

In reviewing summary judgment motions, this Court must view the evidence in a light most favorable to the non-moving party to determine whether a genuine issue of material fact exists. Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970); White v. Turfway Park Racing Assn., Inc., 909 F.2d 941, 943-44 (6th Cir. 1990). A fact is "material" only if its resolution will affect the outcome of the lawsuit.

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Determination of whether a factual issue is "genuine" requires consideration of the applicable evidentiary standards. Thus, in most civil cases the Court must decide "whether reasonable jurors could find by a preponderance of the evidence that the [non-moving party] is entitled to a verdict." Id. at 252.

IV.

Local 18's action in failing to pursue Vencl's grievance through arbitration was "arbitrary" if it was "without rational explanation." Poole v. Budd Co., 706 F.2d 161, 183 (6th Cir. 1983) (citing Vaca v. Sipes, 386 U.S. 171, 194 (1967)). In this case, Local 18's inaction was not considered or chosen; it was the result of a complete lack of consideration and choice. As such, the union's action was "irrational" - there was no ratiocination at all. "When a union makes no decision as to the merit of an individual's grievance but merely allows it to expire by negligently failing to take a basic and required step toward resolving it, the union has acted arbitrarily and is liable for a breach of its duty of fair representation." Ruzicka v. General Motors Corp., 523 F.2d 306, 310 (6th Cir. 1975) ("Ruzicka I").

Local 18 is generally correct that "mere negligence is insufficient to establish a breach of the duty of fair representation." Poole v. Budd Co., 706 F.2d 181, 184 (6th Cir. 1983). See Whitten v. Anchor Motor Freight, 521 F.2d 1335, 1341 (6th Cir. 1975) ("the union may have acted negligently or exercised poor judgment in failing to keep [plaintiff] informed of the status of his grievance, but this is not sufficient to support a claim of unfair representation.") (emphasis added). However, "negligent handling, of the grievance, unrelated...to the merits of [the employees] case,

amounts to unfair representation. It is a clear example of arbitrary and perfunctory handling of a grievance." Ruzicka I, 523 F.2d at 310 (emphasis added).

In Ruzicka v. General Motors Corp. 649 F.2d 1207 (6th Cir. 1981) ("Ruzicka II"), the Court of Appeals expressly drew a distinction between a measured decision not to timely file a meritorious agreement [sic] and the act of simply never bothering to file within the time allotted:

> when a bargaining representative acts arbitrarily in failing to process a grievance submitted to it by an employee without a sound reason for its decision, i.e. without reliance on a prevailing practice, our holding in Ruzicka I will render the union liable for unfair representation.

Id. at 1212. It is significant that Local 18 itself admits that its failure to timely file the arbitration demand was because the Local 18 representative was on vacation. See Local 18's motion for summary judgment at 6. Local 18 does not argue that its failure to timely seek arbitration was "due to reliance on the prevailing practice of freely granted extensions." Ruzicka II, 649 F.2d at 1211. Indeed, the arbitrator found that the unambiguous language in the collective bargaining agreement allowed no conclusion other than that the time limits were to be strictly enforced.

Because Local 18's action was "a clear example of arbitrary and perfunctory handling of a grievance," as defined by the Sixth Circuit in Ruzicka I and clarified in Ruzicka II, both Local 18's and American High Reach's motions for summary judgment must be denied. For the same reason, Vencl's oral cross-motion for partial summary judgment on the issue of whether Local 18 breached its duty

of fair representation is granted. This ruling leaves remaining for trial the issues of: (1) whether American High Reach improperly discharged Vencl; and (2) if so, the amount and apportionment of damages.

V.

Having ruled on the pending motions, the Court now sets the following schedule for the trial of this matter:

Final Pretrial	February 1, 1995, 3:00 p.m.
Trial	February 8, 1995, 9:30 a.m.

Trial briefs, proposed voir dire, and witness lists will be due at the final pretrial.

IT IS SO ORDERED.

KATHLEEN McDONALD O'MALLEY
UNTIED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

MICHAEL VENCL.	:	**Case No. 5:94-CV-109**
	:	
Plaintiff,	:	**JUDGE O'MALLEY**
	:	
v.	:	**ORDER**
	:	
AMERICAN HIGH REACH, INC., et al.	:	**January 31, 1995**
	:	
Defendants.	:	

This Court granted summary judgment in favor of the plaintiff on his claim against defendant Union Local 18 on January 24, 1995. On January 25, 1995, Local 18 moved for reconsideration of that Order. Local 18 both reasserts its earlier claim that summary judgment is appropriate in favor of Local 18, and also argues that, if summary judgment is not to be entered in its favor, summary judgment should not be entered at all. Basically, Local 18 contends that, if this Court is unwilling to conclude as a matter of law that it did not act arbitrarily and, thus, did not breach its duty of fair representation to the plaintiff, then the Court should reserve that question for the jury.

The Court has reviewed the additional briefing submitted by Local 18 and has considered each of the authorities cited. The Court remains of the view, however, that the Union's conduct in this case was arbitrary as a matter of law and that summary judgment in plaintiff s favor on that issue is appropriate. Accordingly, Local 18's motion for reconsideration [Docket # 40] is DENIED.

I.

First, Local 18 reasserts its claim that it is entitled to judgment as a matter of law because its conduct, while admittedly negligent, was neither irrational nor arbitrary. Local 18 cites additional authority for the proposition that mere negligence on the part of a union cannot support a claim for a breach of the statutory duty of fair representation. The Court agrees with this proposition and agrees that a union must be given wide latitude in determining the reasonableness of its actions. Thus, the Court is of the view that a union's exercise of its judgment should not be second-guessed or deemed irrational even if, in hindsight that judgment appears unwise. Local 18 however, did not exercise judgment in this case; it simply failed to act at all.

In its purported recapitulation of controlling law, Local 18 fails to cite the Sixth Circuit's decision in Ruzicka II (Ruzicka v. General Motors Corp., 649 F.2d 1207 (6th Cir. 1991), a decision referenced by this Court in its January 24, 1995 order. In that decision, the Sixth Circuit drew a very clear distinction between the reasoned exercise of judgment by a union, which is to be given wide latitude, and the unexplained failure to act at all. According to the Sixth Circuit, the latter constitutes a classic case of arbitrary behavior on the part of a union. While Local 18 orally notified all appropriate parties of its intent to arbitrate plaintiff s grievance, it failed to take the steps prerequisite to doing so. Local 18 does not claim that it made a reasoned decision not to file the arbitration documents in a timely fashion, or that under the terms of the collective bargaining agreement it could have concluded in good faith that an untimely filing would be permitted to proceed. Indeed, the arbitrator ruled against plaintiff on his grievance solely because the terms of the collective bargaining agreement

clearly prohibited consideration of an untimely arbitration request. Given these facts, Ruzicka -II mandates the conclusion that the union's actions were arbitrary as a matter of law.

The very cases upon which Local 18 now relies in its motion for reconsideration also compel the conclusion that the Court's prior decision in this case was accurate. See e.g. Black v. Ryder/P.I.E. Nationwide Inc., 15 F.3d 573 (6th Cir. 1994) (failure to call a witness whose testimony could be critical to ultimate success in arbitration proceedings was sufficient to support the conclusion that the union's conduct was "so arbitrary and unreasonable as to be beyond the realm of the rational"). See also Heinz v. Anchor Motor Freight, Inc., 424 U.S. 554, 96 S.Ct.1048, 47 L.Ed 2d 231 (1976) (plaintiff may establish a breach of fair representation by meeting burden of proving that the grievance process was "seriously flawed" by the union's improper conduct); Taylor v. Ford Motor Co., 866 F.2d 895, 898-99 (6th Cir. 1989) (failure to present favorable evidence during the grievance process may constitute a breach of the duty of fair representation if that evidence likely would have brought about a different result). These cases all support the proposition that a union's failure to act can and should be deemed sufficiently egregious to support a claim against it when that failure effectively controls the result in the grievance process.

Thus, whether the Court analyzes this issue under Ruzicka II, as it did previously, or under the cases on which Local 18 now relies, the result is the same: summary judgment in Local 18's favor is simply not warranted. Here, Local 18 failed to request arbitration of plaintiff's grievance in a timely fashion, a grievance which it concedes presented a justifiable and supportable claim. The arbitrator's decision

rejecting plaintiff's grievance was based solely on his conclusion that the request for arbitration had not been filed timely, and that timely filing was mandatory under the applicable Collective Bargaining Agreement. Concededly, Local 18 did everything it could to attempt to rectify the problem created by its own inaction. But a union cannot save itself from the legal effect of its own conduct through after the fact efforts to rectify the unrectifiable.

II.

Local 18's claim that this Court should not enter judgment in plaintiff's favor is also unsupportable. After asserting, now twice, that there is no genuine issue of material fact presented by the matter before the Court, and that the question of the propriety of its conduct should be decided by this Court as a matter of law, Local 18 now claims that if the Court attempts to decide the issue as a matter of law against Local 18, the Court may not do so. Local 18 now, asserts that the question of whether its conduct was arbitrary or irrational can only be decided in the plaintiff's favor if it is decided by a jury. This Court disagrees.

The question of whether a union's conduct is arbitrary or irrational and, thus, can support a claim for a breach of the duty of fair representation, is a mixed question of law and fact. Where there are disputes regarding the underlying facts (i.e., facts relating to the nature or effect of the union's conduct), the Court is justified in presenting the issue to the jury. Where, however, the underlying facts which describe and define the union's conduct and which establish the ultimate impact of that conduct on the plaintiff's grievance are undisputed, the Court not only may decide the question as a matter of law, under Rule 56(c) of the Federal Rules of Civil Procedure, it must decide the question as a matter of

law. When it served its purpose, Local 18 asserted that there was no genuine issue of material fact pertinent to the Court's decision on the legal effect of Local 18's conduct. The Court agrees.

For all these reasons, summary judgment in favor of the plaintiff remains justified. The trial of this matter will proceed on all remaining issues.

IT IS SO ORDERED.

KATHLEEN McDONALD O'MALLLEY
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

MICHAEL VENCL,	:	**Case No. 5:94-CV-109**
	:	
Plaintiff,	:	**JUDGE O'MALLEY**
	:	
v.	:	**ORDER**
	:	
AMERICAN HIGH REACH, INC., et al.	:	**February 6, 1995**
	:	
	:	
Defendants.	:	

Earlier in this case, defendant Local 18 filed a motion to strike plaintiff's prayer for attorney's fees (docket no. 14). In an Order dated May 19, 1994, Judge White granted that motion (docket no. 17). Plaintiff has filed a motion to reconsider Judge White's Order (docket no. 38). Plaintiff's motion for reconsideration (docket no. 38) is DENIED AS MOOT in light of the following clarification.

The law regarding recovery of attorney's fees by an ex-employee in a "hybrid §301" action has been set out and explained as follows:

> One of the primary purposes of the American rule is to avoid penalizing the losing party merely because the party chose to defend or prosecute a lawsuit. Summit Valley 102 S. Ct. at 2116. Consistent with this policy, an exception to the American rule cannot be justified solely on the ground that a losing defendant's wrongful conduct forced the

plaintiff to resort to litigation. Id. Here, however, the expense [that the plaintiff] incurred in obtaining legal representation in the district court in his contractual grievance against [his employer] is not merely a result of the harm that [his union] did him; it is the harm itself. The essence of [the plaintiff's] claim against [his union] is that [the union] wrongfully failed to represent him in his grievance against his [ex-employer]. Requiring [the union] to pay [plaintiff's] expenses in providing for himself the representation against [the employer] that [the union] failed to provide does not penalize [the union] for choosing to defend this lawsuit, as [plaintiff] would have incurred attorney's fees in prosecuting his claim against [the employer] even if [the union] had conceded that it breached its duty of fair representation. Thus, the [attorney's fees] assessed against [the union] represented damages, not attorney's fees per se, and does not violate the American rule. See Stanton v. Delta Air Lines, Inc., 669 F.2d 833, 838 (1st Cir. 1982); Self v. Drivers Local 61, 620 F.2d 439, 444 (4th Cir. 1980); **Scott v. Local 377, International Brotherhood of Teamsters, 548 F.2d 1244, 1246 (6th Cir.), cert. denied, 431 U.S. 968, 53 L.Ed. 2d 1064, 97 S.Ct. 2927 (1977)**; Chuy v. National Football League Players' Association, 495 F.Supp. 137, 140-41 (E.D. Pa. 1980).

Dutrisac v. Caterpillar Tractor Co., 749 F.2d 1270, 1275-76 (9th Cir. 1983).

The Dutrisac court added in a footnote, however: "an award that included [plaintiff's] expenses in prosecuting his claim against [his union] would raise different issues. It, indeed, would penalize [the union] for litigating the issue of whether it breached its duty of fair representation and would be improper unless it fell within the common benefit exception." Id. at 1276 n.3.

In sum, the law states that Vencl may recover those attorney's fees incurred in pursuing his wrongful discharge claim against his employer, if he prevails, as a part of his compensatory damages.[1] Vencl may not recover those attorney's fees attributable to pursuit of his claim of unfair representation against Local 18, absent special circumstances, because to do so would violate the American Rule. This Court reads Judge White's earlier Order only to state this latter proposition.

Given the parties' confusion over the reach of Judge White's earlier order, discovery is reopened in this case for a period of sixty (60) days to allow defendants an opportunity to conduct discovery regarding the nature, amount and reasonableness of attorneys fees incurred by plaintiff and to

---

[1]Local 18 argues that an ex-employee may recover his attorney's fees as against his employer, as a part of his compensatory damages, only if the union breached of its duty of fair representation because it acted in bad faith - not if it breached its duty because it acted discriminatorily or arbitrarily. The Court disagrees. Not only does Dutrisac ignore this distinction, but regardless of how the union breached its duty of fair representation, the attorney's fees expended by the ex-employee became necessary because of the union's breach.

allow the parties, if they deem necessary, to obtain and examine expert witnesses to address those issues.

The issue of whether it is the union, the employer or some combination of both who would be responsible for this aspect of plaintiff's damages, if damages are appropriate at all in this case, turns on the appropriate measure for the apportionment of damages in hybrid Section 301 suits. That issue has not yet been resolved by this Court.

The current trial date of February 8, 1995 is vacated by joint request of the parties. Plaintiff is granted leave until February 20, 1995 to file a Motion to Amend his compliant [sic] to add a new party defendant.

IT IS SO ORDERED.

KATHLEEN McDONALD O'MALLEY
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

MICHAEL VENCL,	)	**CASE NO. 5:94 CV 0109**
	)	
Plaintiff,	)	**JUDGE**
	)	**KATHLEEN O'MALLEY**
v.	)	
	)	**[Marginal Order]**
AMERICAN HIGH	)	**March 7, 1995**
REACH, INC., et al.	)	
	)	
Defendants.	)	

Motion Granted with the caveat that (1) Plaintiff's emotional Distress Claim Remains Stricken Per Order Of 5/19/94 (2) Attorney's Fees Are Only At Issue To The Extent Authorized By Order Of 2/6/95 And (3) Plaintiff's Prejudgment Interest Demand Is Stricken.

KATHLEEN McDONALD O'MALLEY
UNITED STATES DISTRICT JUDGE

Nos. 96-3567/3614

•

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MICHAEL VENCL,	)	
	)	
Plaintiff-Appellant/	)	
Cross-Appellee,	)	**ORDER**
	)	**April 9, 1998**
v.	)	
	)	
INTERNATIONAL UNION OF	)	
OPERATING ENGINEERS,	)	
LOCAL 18,	)	
	)	
Defendant-Appellee/	)	
Cross-Appellant.	)	

BEFORE: SILER, BATCHELDER, and GIBSON, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

Leonard Green, Clerk

•Hon. John R. Gibson, Senior United States Circuit Judge for the Eighth Circuit Court of Appeals, sitting by designation.

Supreme Court, U.S.
FILED
AUG 26 1998
OFFICE OF THE CLERK

No. 98-82

IN THE
Supreme Court of the United States

OCTOBER TERM, 1997

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 18,

Petitioner,

v.

MICHAEL VENCL,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

MEMORANDUM IN OPPOSITION

THEODORE E. MECKLER
(Counsel of Record)
1350 Rockefeller Building
614 Superior Avenue, NW
Cleveland, OH 44113-1384
(216) 241-5151

JAMES W. TEKAVEC
600 Standard Building
1370 Ontario Street
Cleveland, Ohio 44113
(216) 621-4810

Counsel for Respondent

August 27, 1998

QUESTIONS PRESENTED

1. May a union be held liable for breach of its duty of fair representation where it decides that a grievance is meritorious but fails to file timely for arbitration because its business agent goes on vacation instead?

2. When a union's breach of the duty of fair representation forces the member to proceed independently against the employer to seek redress for breach of the collective bargaining agreement, may the court award as part of its remedy the costs of obtaining a settlement with the employer to provide such redress, regardless of whether the employer is liable for breach of contract?

3. Did petitioner preserve Question No. 2 in the lower courts by arguing that the dismissal of the employer through a settlement of the breach of contract claim was itself sufficient to warrant denial of any relief against the union?

TABLE OF CONTENTS

Page:

Questions Presented i

Table of Authorities iii

Statement 1

REASONS FOR DENYING THE WRIT 7

The Questions Presented in the Petition Were Not Preserved in the Courts Below, And in Any Event the Ruling Below Is Consistent With Other Appellate Decisions as Well as With Previous Decisions of This Court 7

Conclusion 15

TABLE OF AUTHORITIES

CASES

Page:

ALPA v. O'Neill,
499 U.S. 65 (1991) 11

Bellesfield v. RCA Communications,
675 F. Supp. 952 (D.N.J. 1987) 11

Black v. Ryder/PIE Nationwide,
15 F.3d 573 (6th Cir. 1994) 10

Chacon v. Wood,
36 F.3d 1459 (9th Cir. 1994) 9

Flynn v. Prudential Insurance Co.,
1996 U.S. Dist. LEXIS 7638 (S.D.N.Y. 1996) 11

Garcia v. Zenith Electronics Corp.,
58 F.3d 1171 (7th Cir. 1995) 11

Hanson v. Denkla,
357 U.S. 235 (1958) 14

Hill v. Sanford Corp.,
1997 U.S. Dist. LEXIS 3713 (N.D. Ill. 1997) 12

Hotel & Rest. Employees Local 54 v. Danziger,
709 F.2d 815 (3d Cir. 1983),
vacated, 468 U.S. 491 (1984) 9

Kamen v. Kemper Finan. Serv.,
908 F.2d 1338 (7th Cir. 1990),
rev'd, 500 U.S. 90 (1991) 9

Liberty Mutual Insurance Co. v. Wetzel,
424 U.S. 737 (1976) 8

Lindheimer v. Illinois Bell Telegraph Co.,
292 U.S. 151 (1934) 9

Perdaza v. Shell Oil Co.,
942 F.2d 48 (1st Cir. 1991) 9

Poole v. Budd Co.,
706 F.2d 181 (6th Cir. 1984) 10
Riley v. Letter Carriers Local 380,
668 F.2d 224 (3d Cir. 1981) 12
Ruzicka v. General Motors Corp.,
649 F.2d 1207 (6th Cir. 1981) 10, 12
Trnka v. UAW Local 688,
30 F.3d 60 (7th Cir. 1994) 11
Vaca v. Sipes,
386 U.S. 171 (1967) 11

STATUTES AND RULES

28 U.S.C. § 1291 5

Federal Rule of Appellate Procedure
Rule 28(a)(2) 5

MEMORANDUM IN OPPOSITION

At issue in this case is a judgment against a union for breach of the duty of fair representation based on the fact that the union officer who was supposed to seek arbitration of respondent's discharge went on vacation instead. The courts below deemed this perfunctory grievance handling to be arbitrary and in breach of the DFR, and the union now objects, based in part on arguments that it did not raise below. Because the decision below is consistent with other lower court decisions, and because the questions on which review is sought are not properly presented and were not preserved below, the petition for a writ of certiorari should be denied.

STATEMENT

For fifteen years, respondent Michael Vencl was employed by American High Reach Inc. ("AHR") as a technician, repairing machinery both in his employer's Richfield, Ohio facility and in other locations. AHR's Richfield employees were represented in collective bargaining by petitioner Operating Engineers Local 18.

In March, 1993, respondent was injured at work when a large piece of equipment rolled over his foot. Although respondent tried to work for the next two days, against his doctor's advice, the injury worsened and ultimately his doctor instructed him to stay off the foot and take medication. AHR reprimanded respondent for consulting his doctor, and ultimately fired him for being "unreliable."

Respondent filed a grievance which petitioner processed through the first two steps of the grievance procedure as provided by the collective bargaining agreement ("CBA"). Although AHR denied the grievance at both levels, petitioner

acknowledged that respondent had a meritorious grievance, and committed to file for arbitration. The CBA required requests for arbitration to be made, *in writing, within three business days* of the completion of the second step. At the grievance hearing, and before AHR answered the grievance, the union's business agent allegedly told the company of his desire for arbitration if the grievance were denied. But instead of filing within the three days, the business agent went on vacation. As a result, the union did not get around to filing for arbitration until the fourth day, and that was done by a different union official. Due to this untimely filing, the arbitrator denied the grievance.

Respondent then sued petitioner and AHR in the United States District Court for the Northern District of Ohio, alleging that American had breached the CBA and that petitioner had breached its duty of fair representation ("DFR"). In response to motions to dismiss filed by both defendants, the district court struck respondents' claims for certain forms of damages and for attorney fees. However, after the case was reassigned to a newly appointed district judge, she granted a motion to reconsider the claim for attorney fees, at least insofar as the fees had been expended in pursuing respondent's contractual claim against AHR. Pet. App. A29-32. The court noted that the cost of pursuing a grievance in court, which is thrust upon an employee when the union breaches its DFR and hence causes the grievance process to misfire, may properly be awarded to the employee as a form of damages, without violating the American Rule whereby parties to litigation normally bear their own attorney fees. *Id.* A31.

After an exchange of discovery, petitioner moved for summary judgment on the ground that petitioner did not breach its DFR; the employer joined this motion, and respondent cross-

moved for partial summary judgment on this issue. Respondent argued that, by going on vacation rather than timely filing for arbitration of a grievance that it recognized was meritorious, petitioner had treated his grievance with such indifference as to be arbitrary, thus violating its DFR. The district court agreed, noting that petitioner's treatment of respondent's grievance "was 'arbitrary' [because] it was 'without rational explanation' [and because] it was the result of a complete lack of consideration and choice." Pet. App. A21. "As such, the union's action was 'irrational' -- there was no ratiocination at all." *Id.* It acknowledged that mere negligence was not a sufficient basis for finding a breach of the DFR, *id.*, but noted that the petitioner here had not merely been careless, such as by relying on a past practice allowing late demands for arbitration that are ultimately rejected by the arbitrator. Nor did petitioner have any rational explanation of why it could reasonably ignore the express contractual requirement of a written demand for arbitration within three days. *Id.* A22. Here, a union official had just gone on vacation and ignored the grievance that he had promised to file, "a clear example of arbitrary and perfunctory handling of a grievance . . .." *Id.* Accordingly, the district court denied the petitioner's and employer's motions, and granted respondent's motion for partial summary judgment. A motion for reconsideration was denied.

Respondent then moved to amend his complaint to join Bramble Equipment Services ("BES"), as a successor to AHR. As the case was being readied for trial, the case was assigned to yet another newly appointed district judge, and respondent settled his claims against AHR and BES, receiving money in return for their dismissal from the case. Petitioner then renewed its motion for summary judgment, arguing that the facts did not make out a breach of the DFR, that attorney fees

could not be awarded as damages in DFR case, and finally that, because the case against the employers had been settled, the district court no longer had jurisdiction of the claim against the union. The district court dismissed the action against petitioner, but solely on these jurisdictional grounds. Pet. App. A12-A15. It recognized that this Court has held that DFR suits may be filed against unions even without being joined to a contract claim against an employer, but it deemed this case to be different because the employer is necessarily involved in any case alleging that the DFR breach involved the failure to process a claimed breach of the CBA. *Id.* A14-A15. In such "hybrid" cases, the court said, dismissal of the employer prevents the employee from showing a necessary element of his claim against the employer, thus depriving the district court of jurisdiction.

Respondent then appealed to the United States Court of Appeals for the Sixth Circuit. He argued that this Court has long held that DFR claims, even DFR claims growing out of improper grievance processing, may be brought solely against the union without being pursued to judgment against the employer, or against the employer without being pursued to judgment against the union, although damages would be apportioned between the two defendants. At trial on remand, he argued, the question of breach of contract could be litigated regardless of whether the employer was still a party. Petitioner defended its judgment on a narrower ground than the one stated by the district court. According to petitioner's argument below, a union member may not recover against a union for breach of DFR unless the employee has also recovered a judgment against the employer. Moreover, it contended, the employer's dismissal from the case pursuant to the settlement prejudiced petitioner by preventing the breach of contract issue from being

fully litigated. Petitioner did not make the argument on which it bases the second question presented in its petition for a writ of certiorari -- that a DFR claim against the union cannot be granted unless the district court has previously made a factual finding of the employer's breach.

Petitioner cross-appealed the grant of partial summary judgment in favor of respondent, on three grounds.[1] First, it objected to the granting of respondent's oral motion for partial summary judgment without giving it the opportunity to submit evidence. Second, it denied it had proceeded arbitrarily, but had simply made a negligent error that did not amount to a breach of DFR. Finally, respondent contended that attorney fees could not be awarded in DFR cases as a form of damages. These arguments were presented solely as a basis for overturning partial summary judgment on the issue of liability. Presumably recognizing that respondent, too, might have the opportunity to present more evidence on the issue of DFR liability, petitioner did not contend that its legal arguments on cross-appeal provided an alternate basis for affirming the dismissal for lack of jurisdiction.

---

[1] Its cross-appeal was filed after respondent appealed the dismissal for lack of jurisdiction. Petitioner did not appeal either the grant of partial summary judgment, or the ruling that respondent could seek attorney fees, within thirty days after either ruling was issued. In response to Federal Rule of Appellate Procedure Rule 28(a)(2), petitioner's appellate brief stated in conclusory fashion that its cross-appeal was "properly before this Court pursuant to 28 U.S.C. § 1291." It did not explain how the rulings it was appealing constituted a "final judgment" under section 1291.

A unanimous panel of the court of appeals reversed the dismissal for lack of jurisdiction. It agreed with the parties that relief for a breach of DFR alleged to have been committed in processing a contractual grievance cannot be granted without at least a colorable allegation of breach or contract, Pet. App. A6, but concluded that the absence of the employer as a defendant would not prevent the employee from either alleging or proving such a breach. *Id.* A7-A8. The court acknowledged that the absence of the employer as a party may make litigation of its breach more difficult, as a practical matter, than if the employer were a party, but such problems did not deprive the court of jurisdiction. *Id.* A8-A9.

The court then turned to petitioner's cross-appeal from the grant of partial summary judgment on the issue of liability, and the refusal to strike the claim for attorney fees. The court did not first examine the question of jurisdiction of the cross-appeal; indeed, its opinion does not discuss the question of appellate jurisdiction at all. On the issue of liability, the court agreed with petitioner that mere negligence in the processing of a grievance cannot breach the DFR. Untimely filing of a grievance, for example, will often not breach the DFR if it simply represents a mistake based on a misunderstanding about whether late filings may be acceptable. Here, by contrast, there was no "reasoned conduct," simply inattention to the grievance. Such "irresponsible inattention" may amount to arbitrary conduct in breach of the DFR. Pet. App. A9-10.

Finally, the court of appeals upheld the district court's determination that attorney fees might be awarded as damages, because the expense of pursuing the claim against the employer is precisely what the union "cost" the employee by failing to undertake this action itself. *Id.* A10-A11. The court agreed that

the American Rule bars a member from obtaining an award of fees for the efforts to obtain relief from the union, but not those fees and costs incurred in pursuing his claim against the employer. The district court's ruling had properly distinguished between these two forms of relief. Accordingly, the court remanded for further proceedings to determine whether any relief should be awarded and, if so, in what amount.

Petitioner then filed a petition for rehearing in which it repeated its previous point but also argued, for the first time, that the partial summary judgment was improper because the district court had not yet found a breach of contract by the employer. The petition was denied without any judge voting for rehearing.

REASONS FOR DENYING THE WRIT

THE QUESTIONS PRESENTED IN THE PETITION WERE NOT PRESERVED IN THE COURTS BELOW, AND IN ANY EVENT THE RULING BELOW IS CONSISTENT WITH OTHER APPELLATE DECISIONS AS WELL AS WITH PREVIOUS DECISIONS OF THIS COURT

Neither of the questions that respondent asks this Court to decide were either properly presented in the courts below, or are otherwise worthy of the Court's consideration. The first question, about the standard to be used to deciding whether a union breaches its DFR through perfunctory processing of a grievance, was decided in the district court on a motion for partial summary judgment, which the court of appeals reviewed despite the fact that it lacked jurisdiction; moreover, the rulings below on this issue conflict neither with this Court's decisions

nor with the decisions of other federal courts. The second question, whether an employee can obtain relief against the union for violation of the DFR without first showing a breach of contract by the employer, was simply not presented below; instead, petitioner argued only that the dismissal of the employer in connection with a settlement was prejudicial because it excused respondent from having to show a breach of contract. Nor did the court of appeals excuse respondent from proving a breach of contract -- it simply left that issue to be decided on remand. Accordingly, the decision below was entirely correct and is not in conflict with other courts of appeals, and the petition should be denied.

1. The principal issue on which petitioner seeks review is whether a union may violate its DFR by any action other than "bad faith or arbitrary or discriminatory conduct," and specifically by missing a deadline for seeking arbitration of a grievance "through unintentional inadvertence." Pet. i.

a. That issue is not presented here, and it was not properly presented in the court below. Petitioner sought summary judgment arguing that it simply made a mistake in processing the grievance through mere negligence, and that negligence was not sufficient to make out a violation of the DFR; respondent cross-moved for partial summary judgment on the issue of whether petitioner had violated its DFR by its perfunctory handling of the grievance. The district court denied petitioner's motion for summary judgment and granted respondent's motion for partial summary judgment on this one issue in the case. Both rulings were entirely interlocutory, and neither was appealable. *Liberty Mut. Ins. Co. v. Wetzel*, 424 U.S. 737, 744 (1976). Nor did petitioner file any appeal from those orders within the thirty-day time limit.

Respondent did appeal after the district court dismissed the action for lack of jurisdiction, but that action did not create jurisdiction for the cross-appeal of the grant of the motion for partial summary judgment. The fact that a court of appeals has jurisdiction of an appeal does not mean that it necessarily has jurisdiction of a cross-appeal -- jurisdiction of cross-appeals must be established separately. *See, e.g., Perdaza v. Shell Oil Co.*, 942 F.2d 48, 54-55 (1st Cir. 1991) (denial of summary judgment could not be cross-appealed with appeal from dismissal on preemption grounds); *Hotel & Rest. Employees Local 54 v. Danziger*, 709 F.2d 815, 821 (3d Cir. 1983), *vacated on other grounds*, 468 U.S. 491 (1984) (denial of summary judgment could not be cross-appealed with appeal from preliminary injunction). And a cross-appeal cannot be filed from a favorable judgment, simply because a party does not like some of the adverse rulings that were entered in the course of reaching that judgment. *E.g., Lindheimer v. Illinois Bell Tel. Co.*, 292 U.S. 151, 176 (1934). Because the district court's judgment was entirely in petitioner's favor, there was no judgment from which it could file a cross-appeal.

Moreover, although courts of appeals have jurisdiction to review all interlocutory orders that are merged into the final judgment, because they could have affected the outcome, *e.g., Chacon v. Wood*, 36 F.3d 1459, 1467 (9th Cir. 1994); *Kamen v. Kemper Finan. Serv.*, 908 F.2d 1338, 1341 (7th Cir. 1990), *reversed on other grounds*, 500 U.S. 90 (1991), the partial summary judgment in respondents' favor could have had no impact on the later decision to dismiss for lack of jurisdiction. As a consequence, the court of appeals did not have jurisdiction of the cross-appeal, and certiorari should not be granted in order to decide whether the opinion of the court of appeals addressing that question was correct.

b. Nor is petitioner correct in accusing the court below of holding that it could be found guilty of violating the duty of fair representation based on merely "unintentional inadvertence." To the contrary, the district court specified that "mere negligence on the part of a union cannot support a claim for breach of the statutory duty of fair representation." Pet. App. A21, A25. The Sixth Circuit has consistently held that mere negligence is not enough. *E.g.*, *Black v. Ryder/PIE Nationwide*, 15 F.3d 573, 584 (6th Cir. 1994); *Poole v. Budd Co.*, 706 F.2d 181, 184 (6th Cir. 1984); *Ruzicka v. General Motors Corp.*, 649 F.2d 1207, 1212 (6th Cir. 1981). Where the union can offer a reasoned explanation for its conduct, the *Ruzicka* standard excuses it from liability. On the other hand, "an arbitrary decision is one which arises from caprice or is without reason." *Id.* at 1211 n.3. In such a case, a breach of the DFR may be found.

Here, the union did not offer **any** explanation for its failure to pursue the grievance. It simply explained that its business agent had gone on vacation instead of filing an arbitration demand for a grievance that it recognized was valid. In the courts below, the union did "not claim that it made a reasoned decision not to file the arbitration documents in a timely fashion." Pet. App. A25; *see also id.* A10. It was this absence of reasoned decision-making that formed the basis for the finding that petitioner's actions were perfunctory and arbitrary. In this regard, the decision below is consistent with this Court's prior decisions and with the decisions of other lower federal courts.

Indeed, the petition itself recognizes that long-standing Sixth Circuit law is that simple negligence is not sufficient to warrant a finding of DFR breach. Pet. 12-13, citing cases.

Petitioner urges this alleged intra-circuit disagreement as a basis for granting review in this case. If anything, however, the fact that the Sixth Circuit generally does not follow the rule of law that petitioner inaccurately attributes to the decision below is a reason not to grant review here.

Nor is there any conflict between the decision below and the various decisions of this Court and other lower federal courts that petitioner cites. This Court has repeatedly held that the duty of fair representation requires a union to "make decisions as to the merits of particular grievances, in a good faith and nonarbitrary manner," *Vaca v. Sipes*, 386 U.S. 171, 194 (1967), while protecting the union's ability to make incorrect decisions so long as it acts both rationally and within a wide range of reasonableness. *ALPA v. O'Neill*, 499 U.S. 65, 75-76 (1991). But where the union either ignores a grievance, or processes it in a perfunctory way, it may be found to have violated its DFR. *Vaca*, *supra*, 386 U.S. at 194.

Every one of the reported cases cited by petitioner upheld the union's treatment of a grievance because the union actually made a reasoned decision that fell within the "wide range of reasonableness." In most of the cases the decision was about the merits of a grievance, *Trnka v. UAW Local 688*, 30 F.3d 60, 62-63 (7th Cir. 1994); *Bellesfield v. RCA Communications*, 675 F. Supp. 952, 957 (D.N.J. 1987); *see also Flynn v. Prudential Ins. Co.*, 1996 U.S. Dist. LEXIS 7638 (S.D.N.Y. 1996) (plaintiff claimed that union filed untimely, but undisputed evidence was that union had decided that grievance lacked merit); in two others, the decision was either a tactical one about the arguments to be presented in an arbitration, *Garcia v. Zenith Electronics Corp.*, 58 F.3d 1171, 1177 (7th Cir. 1995), or a procedural one about the desirability

of delaying a demand for arbitration so that other processes could be completed. *Riley v. Letter Carriers Local 380*, 668 F.2d 224, 228 (3d Cir. 1981). In each case, the court simply refused to second-guess the union's decision, because whether or not it was incorrect, it was within a wide range of reasonableness.[2]

Those decisions do not conflict with the decision below because the union here did not claim that it had made a reasoned decision to make only an oral demand for arbitration within the required time, instead of a written one. Indeed, petitioner did not even make an oral demand for arbitration; according to the petition, it simply stated, during the grievance procedure, that it intended to arbitrate if need be. Pet. 5. But the contractual requirement of a written demand was plain, and "Local 18 does not argue that its failure to timely seek arbitration was due to reliance on the prevailing practice of freely granting extensions." Pet. App. A22, *quoting Ruzicka v. General Motors Corp.*, 649 F.2d 1207, 1211 (6th Cir. 1981). The court below affirmed because "*Ruzicka II* excuses only reasoned conduct, not irresponsible inattention." Pet. App. A10.

---

[2] The only case cited by petitioner that involves a belated filing for arbitration is the unreported decision in *Hill v. Sanford Corp.*, 1997 U.S. Dist. LEXIS 3713 (N.D. Ill. 1997). But in that case, the CBA did not expressly require a written demand for arbitration; the court concluded that the failure to make a written demand, although it derailed the grievance, was understandable because the business agent was sick and an inexperienced union staff member relied on his assurance that arbitration had been demanded.

Here, the courts below were satisfied that the union handled respondent's grievance in only a perfunctory and therefore arbitrary manner, and that the DFR was violated. There is no conflict with the decisions of other lower courts in that regard, and the petition should therefore be denied.[3]

2. The second question in the petition is even more deeply flawed, both because the argument was not made below and because the issue is not presented in this case. In the lower courts, respondent moved for partial summary judgment on the issue of whether petitioner had breached its DFR; petitioner moved to strike respondent's demand for attorney fees and certain other forms of monetary relief. In the end, respondent's motion was granted (finding that there had been a DFR violation), and petitioner's motion was denied (holding that respondent could seek attorney fees). The district court never held that respondent was entitled to relief against petitioner, not to speak of holding that such relief could be obtained without a finding about whether the employer had violated the CBA when it fired respondent. Similarly, the court of appeals did not address the question of whether respondent was entitled to relief in this case. It simply held that the district court had jurisdiction, and affirmed the ruling below that the union violated its DFR and that attorney fees was a proper form of relief. Only in its petition for rehearing did petitioner argue, for

---

[3] There is no merit to petitioner's contention, Pet. 18-19, that the decision below conflicts with many arbitral decisions holding that only substantial compliance with grievance filing deadlines is required. The courts below expressed no view on that general question. After all, the union here was not relying on such a practice, and the CBA was clear in requiring written notice.

the first time, that the partial summary judgment should be reversed because there had not yet been a finding of breach of contract. But that was too late to preserve the question for this Court's review, especially where the petition was denied without comment. *See Hanson v. Denkla*, 357 U.S. 235, 243-244 (1958).

The reason why this issue was never addressed in the court of appeals is that petitioner did not advance its current argument below. Instead, petitioner's argument was that the employer had to be a **party** to the litigation, and that dismissal of the employer from the case destroyed the district court's jurisdiction. It further argued that respondent's settlement with the employer and stipulation of the employer's dismissal prejudiced petitioner in its ability to litigate the question whether the CBA was violated, and constituted an admission by respondent of the insufficiency of its breach of contract claim against the employer. But it never argued that a finding of breach of contract was required, but absent in this case, thus precluding an award of relief.

Petitioner's request for review on the ground that respondent needs to prove a breach of contract appears to be something of an academic exercise. After all, petitioner's position below was that the employer did breach its contract; it pursued that claim in arbitration (albeit belatedly), and it repeatedly asserted in the district court, and it continues to assert in this Court, Pet. 4, that it believed that the employer violated the CBA. Respondent will remind the district court of petitioner's position on this issue, and to argue that petitioner is bound by its prior statements. We do not believe that petitioner has much chance of prevailing on this element of the suit. But the fact remains that the issue was not litigated below, and the

lower courts did not issue any holding contrary to petitioner's position here. Accordingly, review is not warranted on this question either.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

Theodore E. Meckler
Counsel of Record
1350 Rockefeller Building
614 Superior Avenue, N.W.
Cleveland, Ohio 44113-1384
(216) 241-5151

James W. Tekavec
600 Standard Building
1370 Ontario Street
Cleveland, Ohio 44113
216-621-4810

Counsel for Respondent

August 27, 1998